Supreme Court, U. S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,
Petitioner,

versus

BERNARD C. BUTTS, SR., ET UX,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE EL PASO COURT OF CIVIL APPEALS
FOR THE STATE OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondent submits this brief in opposition to the Petition for Writ of Certiorari filed herein by the Petitioner.

OPINIONS BELOW

The order of the Texas Supreme Court (Appendix B of Petition) refusing Petitioner's application for writ of error is unreported. The opinion of the El Paso Court of Civil Appeals (Appendix C of Petition) is reported

at 559 S.W.2d 853 (1977). The judgment of the 109th Judicial District Court of the State of Texas (Appendix D of Petition) is unreported.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT ERRED CONSTITUTIONALLY BY USING THE 'BEST INTERESTS' TEST IN RESOLVING THE INSTANT CUSTODY DISPUTE.

II.

WHETHER THE LOWER COURT COMMITTED CONSTITUTIONAL ERROR BY REFERRING TO THE ENVIRONMENT OF AN INDIAN RESERVATION IN DETERMINING THE APPROPRIATE CUSTODIAN FOR THE CHILD.

III.

WHETHER THE LOWER COURT CONSTITUTIONALLY ERRED BY DETERMINING THE APPROPRIATE FAMILIAL CUSTODIAN OF A CHILD UPON A PREPONDERANCE OF THE EVIDENCE.

STATEMENT OF THE CASE

Bernard C. Butts, Sr. and his wife, Ila Marie Butts, Respondents, are the paternal grandparents of Tiffany Lynette Butts. On or about July 15, 1973, Petitioner Bernadine Rose Brokenleg, Tiffany's mother, relinquished custody of Tiffany to the Butts during their visit to the Reservation. (Statement of Facts pages 6-7, 25-27, 39-41, 71). Although testimony at trial conflicted over the intended length and purpose of this relinquishment, the Trial Court found that Ms. Brokenleg evidenced no intent of regaining custody of Tiffany. (Finding of Fact No. 1). The Trial Court further found that until the institution of the present suit, Petitioner failed to seek the return of Tiffany. (Finding of Fact No. 8). Thus, for a period of three years, Respondents had full custody, control and responsibility for Tiffany's upbringing.

Upon hearing this case, the Trial Court was presented evidence relating to (1) the quality of Tiffany's life while with Petitioner, (Statement of Facts pages 20, 32, 38-39, 45, 90-92, 131, 133); (2) the potential dangers facing Tiffany due to the civil conflicts on the Reservation, (Statement of Facts pages 7, 46-47); (3) Petitioner's contacts with Tiffany at the time of and subsequent to her departure, (Statement of Facts pages 30-31, 39-40, 48-49, 53-54, 56-58); (4) the quality of Tiffany's life while with Respondents, (Statement of Facts pages 11-13, 43-46); and (5) Tiffany's desire to remain with Respondents, coupled with her desire not to return with Petitioner to the Reservation, (Statement of Facts pages 127-137) (See Appendix).

Upon hearing the evidence, the Trial Court found, as fact, that Petitioner Brokenleg had (1) left her child, without expressing an intent to return; (2) failed to provide adequate support for Tiffany; and (3) remained away from Tiffany for more than 3 months, without providing support. Further, the court found, as fact, that Petitioner had adequate financial resources to contribute to the support of her child. The Court also found, as fact, that to return Tiffany to her mother's custody, to be raised by her on the Reservation, would be detrimental both physically and emotionally. Accordingly, the Court terminated Petitioner's parental relationship with Tiffany. The Court also decided that Tiffany's best interests would be served by appointing Respondents as her Managing Conservators.

On appeal, the El Paso Court of Civil Appeals reversed the decree of termination, but affirmed Respondent's appointment as Managing Conservators. In so doing, the Court of Civil Appeals held that Petitioner had satisfied the legal requirement of providing for Tiffany by placing her in the custody of her grandparents. The Court further declared that the termination of Petitioner's relationship was not in Tiffany's best interest. In overruling the trial court's conclusions of law, however, the Court of Civil Appeals did not reject the trial court's findings of facts. Rather, the Court of Civil Appeals amplified on the trial court's findings in declaring that Tiffany's desires, coupled with the more stable atmosphere of Respondent's home justified the custodial award. In fact, the Court of Civil Appeals concluded "that all of the factors listed so bearing on the best interest of the

child in the *Holley* case support the trial court's conclusion that custody should be awarded to the grandparents in this case . . . ." In *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), The Texas Supreme Court identified nine factors to be considered in ascertaining whether termination is in the best interests of the child: "(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interests of the child; (F) the plans for the child by these individuals . . .; (G) the stability of the home or the proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent." 544 S.W.2d 371-372.

In so holding, the court necessarily relied on each of the lower court's findings of fact. Even though these findings were insufficient to establish a statutory termination, the abandonment and lack of support were relevant to the custody award. In light of all these factors, the Court of Civil Appeals found that Tiffany's interests would be best served by remaining with Respondents.

The Texas Supreme Court, on April 5, 1978, refused Petitioner's Application for a Writ of Error, finding no reversible error in the judgment and opinion of the Court of Civil Appeals.

ARGUMENT

I.

The Lower Courts Did Not Constitutionally Err By Using The 'Best Interests' Test In Resolving The Instant Custody Dispute.

The Texas District Court, after an individualized hearing, granted Respondents custody of Tiffany. In so doing, the lower court found that it would be in Tiffany's best interests to remain with her grandparents. This process, and hearing, afforded Petitioner her full constitutional rights as established by *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Quilloin v. Walcott*, ___ U.S. ___, 54 L.Ed.2d 511 (1978).

Petitioner claims that *Stanley* created a constitutional right to a determination of a parent's unfitness prior to the removal of her children from custody. A cursory reading of *Stanley* establishes that this Court did not intend to create a constitutional requirement of unfitness as a prerequisite to a loss of custody.

In *Stanley*, this Court was confronted with a statute that required the State to show a wed father's unfitness prior to the termination of his parental rights, but conclusively presumed an unwed father to be an unfit parent. In invalidating this statute, this Court focused its displeasure on the "procedure by presumption", 405 U.S. at 656, and not on the requisite level of parental misconduct. In reaching this decision, the Court looked to *Bell v. Burson*, 402 U.S. 535 (1971), which held "that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault." 405 U.S. at 657. Analogously, it would be appropriate to summarize *Stanley* as holding that "the State could not, while purporting to be concerned with [fitness in determining parental rights], deprive a citizen of his [parental rights] without a hearing that would assess [fitness]." Yet, it would be error to conclude on the basis of either *Bell* or *Stanley* that the constitution required either a finding of fault prior to the suspension of a driver's license, or a finding of unfitness prior to the granting of custodial rights to nonparents. These cases require only that there be an individualized hearing prior to the determination. *See United States Department of Agriculture v. Murry*, 413 U.S. 508, 518 (1973) (Marshall, concurring). In the instant situation, there was such an individualized hearing as to satisfy the Due Process Requirement established in *Stanley*.

Furthermore, in *Quilloin v. Walcott*, ___ U.S. ___, 54 L.Ed.2d 511 (1978), this Court explicitly approved the use of the 'best interests' test in cases where both litigants are relatives of the child. There is no basis for limiting this approach to the 'nuclear' family. The tradition of grandparents raising children, in necessary cases, is equally venerable and equally deserving of constitutional recognition. *Accord, Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In the instant situation, as in *Quilloin*, the challenge comes from a parent who has not, since 1973, exercised actual or legal custody over the child. Nor has Petitioner, since 1973, shouldered any significant responsibility with regard to Tiffany's daily super-

vision, education, protection or care. Furthermore, Tiffany has expressed an unequivocal desire to stay with Respondents. (Statement of Facts, pages 133-134). Finally, the District Court's decision places Tiffany with the same set of legal custodians with whom she has lived since 1973. In light of all these circumstances, *Quilloin* controls the instant case, and it cannot be said, "that the State was required in this situation to find anything more than that the [custody award] was in the 'best interests of the child.' " ___ U.S. ___, 54 L.Ed.2d at 520.

II.

The Lower Courts Committed No Constitutional Error By Referring To The Environment Of An Indian Reservation In Determining The Appropriate Custodian For The Child.

A. *The findings of fact were not based on racial considerations.*

A full consideration of the Statement of Facts makes it clear that District Judge was primarily interested in Tiffany's well being, rather than her status, or that of Petitioner, as an enrolled tribal Indian. In making Findings of Fact in this case, the District Judge found that (1) Petitioner had left Tiffany, without evidencing an intent to return, (2) that Petitioner had not provided adequate support for Tiffany, (3) that Petitioner has stayed away from Tiffany for more than three months, and (4) that Petitioner had always had adequate financial resources to contribute to the support of Tiffany. In these findings of fact, Petitioner

could find no racial reference; indeed, she could find but a mere description of he own actions. Nor could Petitioner find a racial refere ce in the Court of Civil Appeals' decision on custody. None of these findings of fact were overruled by the El Paso Court of Civil Appeals. The appellate court merely ruled that these facts did not justify a termination of parental rights under the appropriate statutory provisions. 559 S.W.2d at 856. The difficulty of a custody determination "lies in part in the fact that most of the factors listed have some equal application to both the issue of custody and the issue of termination." 559 S.W.2d at 857. The Court of Civil Appeals explicitly mentioned that (1) Tiffany's desires (2) the stability of the home and (3) all other factors bearing on Tiffany's best interests supported the custody award.

Rather, Petitioner relies on the District Court's use of the words 'Indian' and 'Indian Reservation' to claim that improper racial considerations entered into the decision. A review of the two challenged findings of fact demonstrate the weakness of Petitioner's position.

Finding of Fact No. 6 declares that Tiffany had expressed to the Trial Court that to "return the child to Respondent's custody to be reared on an Indian Reservation would be detrimental and endanger the physical and emotional well-being of said child". Indeed, Tiffany made the first mention of the Reservation in her testimony before the Judge, declared her dislike for it, and expressed a desire not to be with her mother. (Statement of Facts pages 129-133). In adopting Tiffany's own express distaste for life on the

Reservation, the trial judge cannot be deemed to have made a discriminatory racial classification. This finding of fact was appropriately based on the testimony of the child involved in the hearing, and not a preconceived notion of racial characteristics.

Finding of Fact 7 declares that since Tiffany has non-Indian physical features, "her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional well being." This finding must be read in light of the evidence adduced at trial of the civil conflicts arising on and around the Reservation. (Statement of Facts pages 7, 46-47). It might be inferred that the civil conflicts were racially divisive. In light of these conflicts, Tiffany's safety would be best protected by her remaining with Respondents. A Finding of Fact dealing with her physical safety, although expressed inartfully, should not give rise to the claim that irrelevant racial considerations entered into the trial court's decision.

B. *If racial considerations were present, the Trial Court handled them constitutionally.*

This Court has recently held that in areas of fundamental rights, such as voting and education, there is no *per se* rule against a nondiscriminatory consideration of race. *Regents of the University of California v. Bakke*, ___ U.S. ___, 98 S. Ct. 2733 (1978); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). As long as race is not used to automatically exclude an individual from educational

opportunities, the State universities "may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate education purpose." *Bakke*, 98 S. Ct. at 2763 n. 53 (Powell). Nor is the "permissible use of racial criteria . . . confined to eliminating the effects of past discriminat[ion]." *United Jewish Organization*, 430 U.S. at 161 (plurality opinion). Rather, the permissible use of racial considerations in individualized hearings seems to extend so far as is necessary to effectuate a permissible state goal.

In the instant case, race, if it was considered at all, was considered only to determine the emotional and physical well-being of Tiffany. Such a use of race in adoption proceedings has generally been upheld, so long as race itself is not the determinative factor. *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 3103 (1978); *In Re Adoption of a Minor*, 97 U.S. App. 99, 228 F.2d 446 (1955); *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E. D. La. 1973). When racial considerations arise due to their relevancy to the particular dispute, there is no constitutional violation so long as they are but one of the many factors taken into consideration. *Bakke*, 98 S. Ct. at 2763. (Powell). Thus, Ms. Brokenleg's "qualifications . . . have been weighed fairly and competitively, and [s]he [has] no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.*

In the instant case, the only mention of racial considerations was in the context of (1) Tiffany's desires and (2) the environment most suitable for Tiffany to be

raised in. Since these references were not made in such a manner as to automatically exclude the consideration of Petitioner as Tiffany's custodian, or stigmatize Petitioner, there has been no infringement on Petitioner's Fourteenth Amendment rights.

Further, this Court has consistently held that "Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). *See also Washington v. Davis*, 426 U.S. 229 (1976). In the instant case, there has been, and there can be, no showing of such discriminatory intent. The lower courts were faced with the awesome responsibility of deciding which familial unit would fulfill Tiffany's best interests. In determining this issue, the courts considered all relevant criteria. There was no decision based solely on race. Rather, the decision was based on the totality of the circumstances, perhaps including the ethnic environment most appropriate for Tiffany. As in the adoption cases, this was not a constitutionally impermissible consideration in the context of the instant individualized proceedings.

C. *The lower courts had sufficient grounds other than those challenged by Petitioner to support the custody award.*

The District Court found, as fact, that Petitioner had left her child, afforded no contribution to her support, and had failed for over three years to seek her return. The Court of Civil Appeals amplified these findings of fact, and found that all of the factors (including Tiffany's wishes and the stability of Respondents' home) bearing on the best interests of Tiffany supported the custody award to Respondents. In light of these explicit findings of fact, it is readily ascertainable that the lower courts would have awarded Respondents custody of Tiffany, even if Findings No. 6 and 7 were never considered. There is no evidence that the absence of these two Findings would have affected the custodial award.

In this situation, this Court has declared that the mere consideration of improper factors is insufficient to require a reversal of the resulting decision. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Rather, if "the same decision would have resulted even had the impermissible purpose not been considered . . . the complaining party . . . no longer could fairly attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 270-71, n. 21 (1977).

In the instant case, not only would the custodial decision be the same absent consideration of Findings in its opinion. There is no evidence to warrant upheld absent consideration of those Findings. The Court of Civil Appeals never referred to those Findings in its opinion. TThere is no evidence to warrant any argument that the Court of Civil Appeals even looked to those challenged Findings. Rather, the Court of Civil Appeals based its decision solely on (1) Tif-

fany's wishes, (2) the relative stability of the homes, and (3) the other factors relevant to a custody award. Thus, there is no basis for the argument that either Finding No. 6 or Finding No. 7, if impermissibly considered, contributed materially to the custody award. *Village of Arlington Heights*, 429 U.S. at 270-71 n. 21. Accordingly, the lower courts' custodial award is in full accordance with the applicable decisions of this Court.

III.

The Lower Courts Did Not Constitutionally Err By Determining The Appropriate Familial Custodian Of A Child Upon A Preponderance Of The Evidence.

In determining that Respondents should have custody of Tiffany, the courts below based their decision upon a preponderance of the evidence. Petitioner contends that the utilization of this standard was constitutionally impermissible. However, each of these cases upon which Petitioner relies is readily distinguishable from the instant case. Those cases fail to support Petitioner's position that interfamilial custodial disputes should be decided upon a standard of evidence more strict than that which has historically served as a guide for the resolution of civil disputes.

In Re Winship, 397 U.S. 358 (1970), confronted this Court with the "narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an

adult." 397 U.S. at 359. In deciding that a juvenile should have that protection, this Court focused on the stigma that would potentially follow an adjudication of guilt in a juvenile proceeding. The Court was also concerned with the juvenile's potential loss of liberty due to 'temporary' incarceration. It was only in light of this potential stigmatization and incarceration of the juvenile that the Court insisted upon such a high standard of proof.

Similarly, it was the Court's concern with "the drastic deprivations that may follow" a deportation proceeding that led this Court to insist upon a 'clear and convincing' standard of proof in *Woodby v. INS*, 385 U.S. 276, 285 (1966). The Court focused on the government's power to physically remove a resident from this country, uprooting him from his past and placing him in an unknown situation, as proof of the necessity of a "higher degree of proof than applies in a negligence case." 385 U.S. at 285.

Each of the other cases that Petitioner cites in relation to her argument deals with the unique situation of a State's attempt to deny an individual certain benefits, or certain rights. In both *Sims v. State Department of Public Welfare*, 438 F. Supp. 1179 (S. D. Tex. 1977), and *Alsager v. District Court*, 406 F. Supp. 10, 25 (S. D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976), the government attempted to break up the family unit, contrary to the wishes of the parents *and* the children. In both cases, the District Courts held that State, as movant, could not interfere with the integrity of the family unit, unless it was acting upon 'clear and convincing' evidence.

Accordingly, in order for the higher standards of proof to be applicable, Petitioner would need to show that either stigma, incarceration or a state deprivation of a fundamental right would result from the instant litigation. Absent the presence of one of these considerations, it would be an unprecedented step for the Court to require more than a preponderance of the evidence.

In the instant case, the movant was not the State; rather the parties requesting custody were Tiffany's paternal grandparents. Further, they requested custody only after three years of the sole responsibility for her growth. There was no likelihood that Tiffany, as a result of this litigation, would suffer either an incarceration or stigmatization. Rather, this litigation was to result in the legal determination of a home environment that would serve her best interests. This was not an attempt to dismember any family; rather, this was a search to discover the proper family unit. Guidance as to the appropriate unit was sought from all, including Tiffany. Where, as here, the State is called on to adjudicate the appropriate family unit, and not to advocate the break up of any family, the courts must be free of presumptions and standards of proof that preclude the full consideration of relevant criteria.

Petitioner has cited to no cases evidencing that an interfamilial custody dispute should be decided on more than a preponderance of the evidence. Where there is no possibility of incarceration, or stigmatization, the appropriate standard is the preponderance of the evidence. The lower courts conflicted with no applicable decisions in so holding.

CONCLUSION

It is therefore respectfully submitted that the lower courts conflicted with no applicable decisions of this Court in making the custody award. Accordingly, this case is not a proper one for review by certiorari in the Supreme Court of the United States, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. LEE
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_____

JOHN R. LEE

CERTIFICATE OF SERVICE

John R. Lee, Attorney for Respondent, certifies that on the ____day of September, 1978, he mailed three true and correct copies of Brief of Respondent to Petitioner's Petition for a Writ of Certiorari to the El Paso Court of Civil Appeals for the State of Texas to Bertram Hirsch, Attorney for Petitioner, 432 Park Avenue South, New York City, New York, 10016; Michael L. Fostel, Guardian Ad Litem, Box 1015, Kermit, Texas, 79745; and to Terry L. Pechota, Attorney for the Rosebud Sioux Tribe, P. O. Box 288, Mission, South Dakota, 57555, appearing Amicus Curiae.

_____

John R. Lee

APPENDIX

[127] TIFFANY LYNETTE BUTTS
being called as a witness by Judge Spencer, the oath was not given because of the tender age of the child, and the following questions and answers were adduced:

EXAMINATION

By Judge Ken Spencer:

Q Tiffany, what is your full name? Can you tell me?

A Tiffany Lynette Butts.

Q How old are you?

A Six.

Q How long have you been going to school now? Two years?

A I think that's it.

Q You went to kindergarten last year and you're in the first grade this year?

A Yes.

Q Do you like school?

A Yes, I do.

Q Do you like your teacher?

A Yes.

Q Do you mind visiting with me?

A No.

Q I may sound like I'm groupy because I have a cold, but I'm really not. Do you know what it is to tell the truth, Tiffany?

A Yes.

[128] Q Do you know what happens to girls that don't tell the truth?

A No.

Q But, you do know the difference between telling the truth and telling a fib, don't you?

A Yes.

Q How long have you lived in Kermit?

A About four years or four months. I don't know which.

Q You were here last Christmas and the Christmas before that. Do you remember that?

A Yes.

Q Do you remember ever living any place else besides Kermit with somebody else?

A Uh-huh.

Q Who would that be?

A First it was just my mother and daddy and next it was just my mother.

Q Do you remember where that was? Was it at Long Beach?

A I don't know. I know it was real far away from here.

Q Does California sound familiar to you?

A That's the first place I lived.

Q You lived with your mother and daddy there?

A Yes.

Q And then your daddy left and you lived with your mama there?

A No.

Q How was it?

A Well, when I still was a baby, my mother took me and we went away [129] to the Reservation.

Q Do you remember that place?

A Yes.

Q Did you like it there?

A No, I didn't.

Q You were too young to go to school there, weren't you?

A Yes.

Q Did you live out in the country or in a little town?

A Out in the country.

Q You didn't have any little girls to play with out there?

A No.

Q Do you have little girls to play with here? Do you have friends now?

A Yes.

Q What are their names?

A Jeffery, Devonn, Carrie, Joe and all of them.

Q And who do you live with now?

A My grandma.

Q Do you live with your grandpa too?

A No.

Q Your grandpa doesn't live with you at your house?

A Sometimes he comes, but he don't stay there.

Q He doesn't stay there? Is he away on business?

A He lives in Odessa.

Q He lives in Odessa?

A Yes.

[130] Q That's your daddy, isn't it, that lives in Odessa?

A No. My daddy lives over here with us.

Q Your daddy lives with you and your grandma?

A Yes.

Q And your grandpa doesn't live with you? He just comes in and visits sometimes?

A Yes.

Q Does your grandma have a nice house for you?

A Yes, she does.

Q Do you have your own room?

A Yes.

Q Do you like it? Is it fixed up for little girls?

A Yes.

Q Do you remember your mama visiting you last Christmas?

A Yes, I do.

Q Have you got a cold like I have?

A Yes.

Q Goodness! Did you know I have a friend in Crane named Tiffany?

A No.

Q She is the daughter of a lawyer in Crane. You said you remembered your mother visiting you last Christmas. Did she stay with you at your house when she came to visit?

A Yes.

Q Did she play with you?

A No, but she talked to me. She wanted me to go back to the Reservation. [131] I didn't want to go because she took badly care of me up there.

Q Do you remember that?

A Yes. I remember everything.

Q You remember everything?

A Yes.

Q How do you mean she took badly care of you?

A Well, for one thing, we was going to walk to town. Mother put her hand on me, and she turned around, and she said she was going to leave me there. She drug me by the hair and ran and went to town. She left me there. I had to stay there and all that stuff. The dogs took a bath with me. That's the reason I had ticks and stuff.

Q You remember all that?

A Yes, and I remember a lot of other things too.

Q You remember things like what, Tiffany?

A Well, the time she locked me in the house and she tried to burn the house down with me in it.

Q She locked you in the house and tried to burn it with you in it?

A Yes.

Q Is that true or did you just imagine that?

A It's true. And then she unlocked it and came back in and then she didn't burn it down. She changed her mind, but she locked me in the house. Just stuff like that. There is a lot of other things that happened besides those two.

Q Did she ever talk about your daddy?

A No. He came there once on my birthday and had to leave because she [131] treated him just like she treated me.

Q How do you mean?

A Well, one time she scratched his coffee table, and she punched holes in one of his suits. She did a lot of other horrible things.

Q What did he do to make her so angry?

A He didn't do nothing mean to her. He didn't even try to beat her up or nothing. He didn't do nothing bad to her.

Q I wonder why she lost her temper. Do you remember living with your mother after your daddy left?

A My daddy was still there and my mama took me away.

Q Did you move in with some other people?

A No.

Q Is that when you went to the Reservation?

A Yes. There is something else I can remember about.

Q What was that?

A We was driving home a long time ago when mama didn't know how to drive a car and we had a wreck, but we were lucky.

Q You didn't get hurt?

A No.

Q Didn't mama get hurt and have to go to the hospital?

A Yes, I think so.

Q But, you were in the car with her when she had the accident?

A Yes.

Q Did it scare you?

A Yes.

[133] Q Where was that?

A We was almost home.

Q Was that up near the Reservation?

A That was on the Reservation.

Q Where did you take your bath when you took one?

A In a big bucket, and the dogs took a bath with me.

Q Every time?

A Yes.

Q Do you know what a dream is?

A Yes.

Q Do you have very many dreams?

A Yes.

Q Do you have all kinds of dreams?

A Yes.

Q Do you remember talking to a lady yesterday about a dream and drawing a picture for her?

A That was a nightmare.

Q You told the lady about the nightmare?

A Yes.

Q Did you just have the one nightmare, or have you had several?

A Not very many times.

Q Would you like to go visit with your mama and stay with her?

A No, I wouldn't.

Q You wouldn't like to be with her?

A No.

[134] Q You know that mamas are very rare people?

A Yes, but not my mama. She ain't.

Q Why wouldn't you like to stay with her?

A I just wouldn't.

Q Has she talked to you about staying with her and visiting with her?

A Yes.

Q When did she talk to you about that? Can you remember?

A Yesterday.

Q Was that the first time she has asked you to go with her?

A No, it isn't.

Q When she is away from you, does she ever call you on the telephone?

A Not very much.

Q Do you remember when you first came to Kermit to live with your Grandma?

A Yes, I do.

Q Did you come to Kermit with your Grandma and Grandpa after you went on a vacation?

A Yes, and my daddy and uncle.

Q Where did you go on your vacation?

A I went to a fruit stand and I forgot the name of it. Just two towns is all we went to, and then by night time, we were in Kermit.

Q And your mama came that Christmas to visit you, didn't she?

A Yes.

Q Did she talk to you about going home with her?

A Yes.

[135] Q Do you like staying here in Kermit?

A Yes, I do.

Q Why do you like to stay here?

A Because of my Grandma and my daddy and my uncle. They all take care of me.

Q Do they take good care of you?

A Yes.

Q Do they make you mind?

A They sure do.

Q But, little girls have to be made to mind sometimes, don't they?

A Yes.

Q And even big girls and little boys and big boys have to mind. Do you go to Sunday School?

A Yes, but I didn't go to Sunday School when I lived with my mother, and I had to fix my own breakfast too.

Q You sure were a little girl to be fixing your own breakfast, weren't you?

A Well, I was three years old.

Q What did you fix for your breakfast?

A Cereal, and that was about it. One time I forgot the sugar.

Q It didn't taste good, did it?

A No. One time I put a lot of sugar in the cereal and it was too sweet.

Q It's not very good if it doesn't have enough sugar, and it doesn't taste good if it has too much sugar, does it?

A No.

[136] Q Do you know what a smiley is in school?

A Our teacher puts a smiley on our papers and she puts a stamp and a sticker on it and then she puts it on the door so we get a smiley on our papers when we do good, but if we do bad on our papers, she gives us a "P" or a "U".

Q Do you ever get any smileys?

A Yes.

Q What does it look like. I just heard about it today, and I don't know what it looks like.

A If you do good, she gives you two "O's" and then she puts a smiley face on your paper and a nose and the "O's" are the eyes.

Q And if you get a smiley face, that's the best there is?

A Yes, and sometimes you get a "G". I like the "G" best because it is the best grade. Sometimes you get an "E" for excellent. That's the best.

Q Do you ever get a smiley face with an "E"?

A Yes.

Q A smiley face means the teacher smiles because she likes what you did. Is that it?

A Yes.

Q Well, I never did have a smiley on any of my papers. Isn't that sad?

A I don't know.

Q Do you think you would like to stay in Kermit?

A Yes.

Q Has anybody told you to say that you wanted to stay in Kermit?

[137] A Nobody ever told me to say anything. My grandmother just told me to tell the truth and I am.

Q Do you know what a witness is?

A Yes.

Q Tell me what a witness is.

A He goes up there and tells the truth about who did what and all that kind of stuff.

Q I think that's fine, and Tiffany, I'm real proud of getting to meet you, and I appreciate your coming in to visit with me. I hope we didn't make you uncomfortable or scare you in any way.

A You didn't.

Q What do you do after you get home from school?

A Play.

Q Are there girls in your neighborhood that you play with?

A Yes.

Q Well, we certainly thank you for coming in and visiting with us.

A Do I go now?

Q Yes, is your grandmother waiting for you out in the hall?

A I think so.

Q Yes, you may leave now, and I sure do thank you for coming in.

A Okay. Thank you.

END OF STATEMENT OF FACTS